Supreme Court U.S.
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No. 02-872

In the Supreme Court of the United States

MARIS DISTRIBUTING COMPANY,
Petitioner,

v.

ANHEUSER-BUSCH, INC.
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The case described in the petition bears little resemblance to the case that was pleaded, tried before a jury, and affirmed by the United States Court of Appeals for the Eleventh Circuit. In an attempt to create the appearance of a conflict between the circuits where none exists, petitioner has characterized this nonprice vertical restraint case as something it is not – a tying case. Petitioner raises issues for the first time that were never part of the case, are not in the record below, and do not warrant this Court's review.

Respondent Anheuser-Busch, Inc. therefore restates petitioner's Questions Presented to conform to the case that was actually tried and the record below:

1. When a party has pleaded, tried, and appealed a case as one involving a nonprice vertical restraint, can that party raise a tying claim for the first time before the United States Supreme Court?

2. In a nonprice vertical restraint case, is the correct measure of market power the manufacturer's market share in the relevant product market?

3. Can a party with less than 1% of the relevant product market and less than 3% of the relevant submarket have market power?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), respondent states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Respondent states that all of its parent companies and subsidiaries (except wholly-owned subsidiaries) are as follows:

Anheuser-Busch Companies, Inc. is the parent company of Anheuser-Busch, Inc.

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15 U.S.C. § 1 1

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OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1-36) is reported at 302 F.3d 1207.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2002. The petition was filed on November 13, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

This case arises from a jury verdict and final judgment for respondent Anheuser-Busch, rejecting petitioner Maris Distributing's claim that paragraph 4(i) of its distribution contract – a nonprice vertical restraint that prohibits public ownership of Anheuser-Busch wholesalerships – is an unreasonable restraint of trade in violation of § 1 of the Sherman Act. In seeking this Court's review, the petition: (1) raises claims and issues that were never part of this case and are not in the record; (2) attempts to create a conflict between the circuits that does not exist; (3) relies on testimony and documents that were excluded

from evidence (which rulings are not challenged here); and (4) persistently misstates the record in a petition that is devoid of a single citation to the record. *See* Sup. Ct. R. 24.1(g). The petition lacks merit and should be denied.

1. Petitioner asserts, for the first time in six years of litigation, that this case involves a tying claim. *See, e.g.*, Pet. 24-27. ***This case is not and has never been a tying case.*** Despite the fact that petitioner filed four complaints, it never pleaded a tying claim. R1-1; R2-19; R3-43; R5-83.[1] The case was not tried or appealed as a tying claim. Indeed, at trial both the district court and petitioner's economic expert, John Pisarkiewicz, agreed that the case involved a vertical restraint, not a tie:

> THE COURT: You would impute market power in the market for the buying and selling of beer to the separate market for the buying and selling of beer distributorships.
>
> [Pisarkiewicz]: Well in tying cases Your Honor that would be exactly the way it would be done.
>
> THE COURT: But ***this is not a tying case.***
>
> [Pisarkiewicz]: ***It is a vertical restraint case.***"

R78-174 to 175 (emphasis added); *see also* R44-619-23 (parties agreed in Joint Final Pretrial Stipulation that "[u]nder

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[1] Anheuser-Busch has cited the record according to the format prescribed by the Eleventh Circuit rules. Volumes 1-54 of the record on appeal are pleadings; volumes 55-92 are hearing and trial transcripts. Thus, "R5-83-20" refers to a pleading at volume 5, docket entry number 83, page 5. "R76-13" refers to an excerpt from the trial transcript at volume 76, page 13.

Section 1 of the Sherman Act, the prohibition on public ownership is a vertical, nonprice restraint analyzed under the rule of reason"); R45-627-1 (district court adopts Joint Final Pretrial Stipulation as part of Pretrial Order).

Similarly, petitioner suggests – without citation to the record – that Anheuser-Busch uses its contractual right to approve the sale of wholesalerships to "control output, prices, exit, and entry" in the relevant product market.[2] *See* Pet. 14; *id.* at 12. Yet Maris Distributing specifically disclaimed – in its complaint, at trial, and before the Eleventh Circuit – that it was challenging this right-of-approval provision as an antitrust violation.[3] R3-42-3 n.3. Indeed, at trial, Rudy Maris (President of Maris Distributing) conceded that "Anheuser-Busch should have that right of approval." R66-8; *see also* R66-152.

2. Petitioner also suggests that the decision below is at odds with precedent from this Court and also conflicts with the decisions of two other courts of appeal. *See* Pet. 15-22. But petitioner's arguments are fundamentally flawed. None of the allegedly "conflicting" decisions involve nonprice vertical restraints; rather, they involve tying claims or group boycotts. Those decisions are therefore factually and legally inapposite.

3. Petitioner also relies on exhibits and testimony that were excluded from evidence. For instance, the alleged "detailed written plan" described at pages 8-9 of

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[2] The contractual right of approval is a separate and distinct provision of the distribution contract between Anheuser-Busch and its wholesalers. *See infra* at 5.

[3] Maris Distributing states in its petition to this Court that it does not challenge this provision (*see* Pet. 13 n.7), but that statement is belied by the remainder of the petition.

the petition was ***excluded*** at trial, along with any testimony concerning it. *See* R69-141 to 148; R75-152 to 154; R85-43 to 47. The Eleventh Circuit affirmed that ruling (Pet. App. 8-9 n.5), and petitioner does not challenge that exclusion here.

4. Finally, petitioner takes enormous liberties with the record. For example, to support its claim that Anheuser-Busch can exert leverage over its wholesalers because they are privately owned, petitioner asserts (inaccurately) that "Anheuser-Busch ... directed [its] distributors regarding the prices to charge retailers." Pet. 11 & n.5. This issue was never part of the case at the trial or appellate level, and there certainly is no evidence in the record (or otherwise) that Anheuser-Busch "directed" its wholesalers to charge certain prices to retailers.

Statement of Facts

The Parties And Their Contractual Relationship. Anheuser-Busch distributes its brands of beer through a nationwide network of approximately 700 authorized wholesalers. R64-8. The relationship between Anheuser-Busch and its wholesalers – including petitioner – is governed by a written contract called the Anheuser-Busch, Inc. Wholesaler Equity Agreement ("Equity Agreement"). Def.Ex. 1, R66-151.

Petitioner Maris Distributing was an Anheuser-Busch wholesaler from 1968 to 1997 with an exclusive territory in the Gainesville and Ocala, Florida areas. *Id.*; R67-56 to 58. Contrary to petitioner's suggestion, it paid ***nothing*** for the right to distribute Anheuser-Busch products. R67-46 to 47.[4]

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[4] Maris Distributing's attempt to create the impression that it "bought" the distributorship from Anheuser-Busch (*see* Pet. 4) is inaccurate. Also without merit is the contention that August Busch, Jr. and Roger Maris

The Equity Agreement permits a wholesaler to sell its business – *i.e.*, the right to distribute Anheuser-Busch products – to buyers subject to Anheuser-Busch's right of approval. Upon first becoming a wholesaler in 1968, Maris Distributing agreed, as part of its Equity Agreement, to this right-of-approval provision – which is commonplace in this and other industries. Pl.Ex. 6, R64-141; R88-137 to 138. Maris Distributing has never questioned or challenged this right. R66-8, 152.

In 1969, less than one year after Maris Distributing became an Anheuser-Busch wholesaler, the Equity Agreement was clarified by amendment to expressly preclude public ownership (either through sale to a publicly-held company or via a public offering of stock). Def.Ex. 3, R67-63. Maris Distributing agreed to the 1969 public ownership clarification without objection (Def.Ex. 2, R67-65 to 67) and executed two subsequent versions of the Equity Agreement which contained the same or a similar provision. Pl.Ex. 28, R65-191; Def.Ex. 1. The operative version of petitioner's distribution contract when this lawsuit was filed was the 1982 Equity Agreement. Def.Ex. 1. The public ownership provision was contained in paragraph 4(i).

August Busch III, CEO of Anheuser-Busch Companies, Inc., testified at length about the rationale behind and justification for the prohibition of public ownership of Anheuser-Busch wholesalers: including the fact that the Equity Agreement is a personal services contract; the degree to which Anheuser-Busch relies on its wholesaler network to represent it and provide those personal services to retail

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struck a deal requiring Maris to play an extra year of baseball in exchange for the distributorship. *Id.* Prior to his untimely death, Roger Maris testified under oath that there was no such deal. R37-450-273 to 74 & Ex. 6 thereto.

accounts; and the importance of having local owners who are active in the business and involved in the community. R84-67 to 84. Anheuser-Busch's economic experts also testified to the procompetitive benefits of the provision (*e.g.*, Anheuser-Busch has a highly efficient distribution system; its distributors are considered the "gold standard") and the lack of any anticompetitive effects (*e.g.*, distributors have had no difficulties getting capital). R87-203 to 206; R88-149 to 153.

Similar provisions on public ownership are common in the brewing industry and in franchisor-franchisee relationships – *e.g.*, McDonald's and Subway. R71-74 to 75; R74-28 to 29, 99 to 101; R88-131, 139; Def.Ex. 199, R74-100 to 101.

Maris Distributing's Efforts To Sell. In August 1996, petitioner formally notified Anheuser-Busch of its intent to sell its business. R67-117. Subsequent discussions between the two parties about a sale were unproductive.[5] Thereafter, petitioner's president had discussions with at least six potential purchasers and informal contacts with many others. R66-94 to 103. Maris Distributing was unable to reach an agreement to sell the business to anyone and never submitted a proposed purchaser to Anheuser-Busch for approval. R66-154 to 157, 189.

That petitioner's efforts to sell were unsuccessful had nothing to do with the public ownership provision. Indeed, Maris Distributing never made any effort to determine whether a public sale would be feasible until ***after*** this lawsuit was filed. R67-107 to 108.

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[5] Although Anheuser-Busch had made two offers to purchase the business, Rudy Maris did not accept them, did not make any counteroffer, and never attempted to negotiate a satisfactory sale. R65-58.

Course Of Proceedings Below

Petitioner filed suit in the United States District Court for the Middle District of Florida, alleging that the public ownership prohibition was an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[6] As a challenge to a nonprice vertical restraint, petitioner's claim was tried under the Rule of Reason. Petitioner was required to prove the existence of a relevant product market and that the restraint at issue had an anticompetitive effect in that market without procompetitive benefit or justification. To demonstrate an anticompetitive effect in the market, petitioner had to prove either (a) that Anheuser-Busch had market power in the relevant market such that there is a genuine potential for anticompetitive effects; or (b) that the challenged restraint caused actual and substantial anticompetitive effects in the relevant market.[7] *See Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996).

The jury trial lasted seven weeks, with Maris Distributing presenting its case-in-chief for six of those

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6 Petitioner later added a Section 2 attempted monopolization claim, and named three corporate affiliates of Anheuser-Busch as defendants on that claim and the Section 1 claim. R5-83. The Section 2 claim and all claims against the affiliate defendants were dismissed on summary judgment. R42-597. These claims were not part of the trial or appeal and have no bearing on this petition.

7 The petition incorrectly states the Rule of Reason test by suggesting that, in lieu of actual anticompetitive effects, it was required to prove both market power ***and*** potential anticompetitive effects. *Compare* Pet. 3, 12. The Rule of Reason, as articulated by the Eleventh Circuit, requires that an antitrust plaintiff prove (1) actual anticompetitive effects in a relevant market or (2) market power in a relevant product market. *See* Pet. App. 6. "Potential" anticompetitive effects are not a separate element of proof but rather are subsumed within the market power analysis. *Id.*

weeks.[8] Maris Distributing claimed that the relevant product market was "the purchase and sale of equity ownership interests in wholesale beer distributorships." R5-83-21. Although Anheuser-Busch disputed the existence of such a market, the evidence was undisputed that Anheuser-Busch's share of that alleged product market was ***less than 1%***. R76-216 to 220; R78-173; Def.Ex. 1509, R76-220. Accordingly, at the close of all the evidence, the district court entered judgment as a matter of law for Anheuser-Busch on the market power issue. R90-4 to 6.

The case went to the jury on special interrogatories. The jury returned a verdict that the provision on public ownership did not violate § 1. R52-789. Although the jury found for Maris Distributing on product market definition, it found that the public ownership provision had ***not*** caused actual and substantial harm to competition in that market.[9] *Id.* The district court entered final judgment for respondent Anheuser-Busch. R52-790.

On appeal, the Eleventh Circuit affirmed. Addressing the market power issue, the court ruled that (1) Maris

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[8] In the 3½ years between the filing of its initial complaint (January 1997) and trial (September 2000), Maris Distributing received extensive discovery: 40,000 pages of documents, answers to 62 interrogatories, responses to 164 requests for admissions, and 28 fact and expert depositions, including a four-day deposition of the corporate representative of Anheuser-Busch. R41-559-3 to 4; R53-799-5.

[9] Given the jury's finding that, after thirty years, the public ownership prohibition had no ***actual*** anticompetitive effects, it is difficult to understand the rationale for petitioner's contention that it should have been permitted to argue the market power issue to the jury to demonstrate a ***potential*** for such effects. This Court has observed previously that market power is "but a 'surrogate for detrimental effects.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (citation omitted).

Distributing could not rely on Anheuser-Busch's market share in beer sales to prove that Anheuser-Busch had market power in the separate market for the purchase and sale of ownership interests in beer wholesalerships; (2) Maris Distributing could not "aggregate" the market share of Anheuser-Busch in the relevant product market (1-3%) with the market shares of its wholesalers; and (3) the "mere existence and exercise of contract power" – such as the right of Anheuser-Busch to approve changes in ownership of its wholesalers to demonstrate market power – "does not show that a defendant ha[s] market power." *See* Pet. App. 11-33. The Eleventh Circuit also rejected petitioner's challenges to various evidentiary rulings. *Id.* at 8-9 n.5.

REASONS FOR DENYING THE PETITION

The decision below is correct, does not conflict with decisions of this Court or any other court of appeals, and does not pose any question that warrants further review.

I. This Case Is Not And Has Never Been A Tying Case

Petitioner's newly-minted tying claim is not properly before this Court. This case was pleaded, litigated, tried, and appealed as a nonprice vertical restraint. Maris Distributing did not raise a tying claim in any of its four complaints before the district court or in its appeal to the Eleventh Circuit, and neither court analyzed or passed on the merits of such a claim. Indeed, in the Joint Final Pretrial Stipulation, the parties stipulated that one of the "applicable principles of law on which there is agreement" was that the public ownership prohibition was a "vertical, non-price restraint analyzed under the rule of reason." R44-619-23. During the trial, petitioner's own economic expert, John Pisarkiewicz, confirmed what had been understood by the parties and the

court since Maris filed its initial complaint – that this was a vertical restraint case, not a tying case. R78-174 to 175.

Nevertheless, petitioner now relies almost exclusively on a tying theory. *See, e.g.*, Pet. 15-17 (contending that Eleventh Circuit failed to follow this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), a tying case); *id.* at 17-19 (asserting that there is a split between the Eleventh Circuit's opinion and a Sixth Circuit tying case); *id.* at 24-27 & n.16 (claiming that this case involves an unlawful tie)). Thus, the entire petition is premised on a theory and claim that were neither raised nor decided in the courts below.

A party may not raise an issue for the first time on appeal, much less in a petition for a writ of certiorari. *See Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) ("[The] question was not raised in the Court of Appeals and is not properly before us"); *see also United States v. United Foods*, 533 U.S. 405, 417 (2001) (refusing to consider issue not raised below). The petition should be denied for this reason alone.

In any event, petitioner's belated tying claim makes no sense. The suggestion that Anheuser-Busch "ties" the distribution contract (*i.e.*, Equity Agreement) to the sale of Anheuser-Busch products (*see* Pet. 25-26 & n.16) imposes an artificial and non-existent distinction. This argument implies that a wholesaler should be able to purchase Anheuser-Busch products for distribution without actually acquiring the legal right to distribute them (*i.e.*, signing the distribution contract). Any suggestion that a manufacturer has created a tying arrangement by requiring a wholesaler to acquire those distribution rights is without merit. *See Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97-98 (2d Cir. 1985) (finding no tie between petroleum

trademark and gasoline because "Th[e] trademark is thus inseparably connected with the gasoline.... [I]t is not distinct from the gasoline sold"); *Redd v. Shell Oil Co.*, 524 F.2d 1054, 1056-57 (10th Cir. 1975) (reversing trial court for erroneously "considering the [Shell] trademark as a separate product sold under a tying arrangement with the [Shell] gasoline"), *cert. denied*, 425 U.S. 912 (1976); *T.A.M., Inc. v. Gulf Oil Corp.*, 553 F. Supp. 499, 507 (E.D. Pa. 1982) ("Plaintiffs cannot claim that Gulf imposed an unwanted commodity upon them by tying the product Gulf gasoline to the Gulf franchise. It was the franchise with its attendant right to sell Gulf gasoline which plaintiffs bargained for in becoming franchisees").

Moreover, were the petitioner's reasoning to be accepted, ***all*** franchise and distribution contracts and exclusive dealing arrangements would be illegal per se and ***all*** distributorship terminations would be antitrust violations:

> [T]o hold that a distributorship relationship is a tying product, to which is tied all products which a manufacturer desires a distributor to sell, would render all exclusive dealing arrangements per se illegal .... [It] would similarly destroy the *Colgate* doctrine which permits termination of distributorship contracts as unilateral refusals to deal.

Refrigeration Eng'g Corp. v. Frick Co., 370 F. Supp. 702, 711 (W.D. Tex. 1974).

Because there is no tying claim in this case, there is, and could be, no conflict between the decisions below and the decision of the Sixth Circuit in *Virtual Maintenance v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert.*

dismissed, 512 U.S. 1216 (1994).[10] *Virtual Maintenance* is a tying case with facts nearly identical to those of *Kodak*. As in *Kodak*, the issue in *Virtual Maintenance* involved derivative aftermarkets (for software updates and hardware maintenance) and a contention that lack of competition in the primary equipment market (for computers) made it impossible for a party to have market power in those aftermarkets. 11 F.3d at 665-67. But there are no derivative aftermarkets in this case, and the Eleventh Circuit correctly noted that Anheuser-Busch never contended that it lacked market power because of the presence of competition in some other market. Pet. App. 31.

The Sixth Circuit itself noted the important distinction between *Kodak*-type tying cases and cases involving vertical nonprice restraints when it distinguished a prior Sixth Circuit panel opinion on the grounds that it "involved vertical nonprice restraints unilaterally imposed by defendant Chrysler upon its distributors." 11 F.3d at 666. In short, there is no conflict between *Virtual Maintenance* and the Eleventh Circuit's opinion.[11]

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[10] That *Virtual Maintenance* has no relevance to this case is confirmed by the fact that petitioner did not even *cite Virtual Maintenance* in its appellate briefs below.

[11] Although Maris Distributing suggests that there is tension in the lower courts over the meaning of *Kodak* in tying cases (*see* Pet. 19 n.12), it is noteworthy that this Court has denied certiorari in many of those cases. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998); *Virtual Maintenance v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert. dismissed*, 512 U.S. 1216 (1994). Moreover, this case would hardly be an appropriate vehicle to resolve a tying issue that was not litigated, tried, or appealed.

II. The Eleventh Circuit Correctly Followed Applicable Precedents In Analyzing Market Power

There is no merit to petitioner's suggestion that the decision below is at odds with this Court's opinion in *Kodak* (*see* Pet. 15-17) and conflicts with the decision of the Fifth Circuit in *Spectators Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215 (5th Cir. 2001) (*see* Pet. 19-22). Neither decision is applicable to a nonprice vertical restraint case or involves similar questions of law. No conflict exists.

A. *Kodak* Has No Applicability To The Market Power Inquiry In A Vertical Restraint Case

Contrary to petitioner's claim, the Eleventh Circuit's opinion is not at odds with *Kodak*. *See* Pet. 15-17. The petition suggests that Anheuser-Busch's share of the relevant market of ownership interests should include those independent distributors with whom Anheuser-Busch merely has a distribution contract. This argument is a warmed-over version of Maris Distributing's twice-rejected "imputed market power" theory – that Anheuser-Busch has market power in beer (an allegation that Maris Distributing never proved) and that this market power should be imputed to the market for ownership interests by virtue of Anheuser-Busch's contracts with its wholesalers. The Eleventh Circuit noted that neither Maris Distributing nor its experts were able to advance an economic reason why such imputation should be made. *See* Pet. App. 18. *Kodak* certainly provides no answer to that question because, as noted above, that case does not involve a tying claim. *Kodak* is therefore factually and legally inapposite.

As both the Eleventh Circuit and the district court correctly determined, in a nonprice vertical restraint case, the question of whether a manufacturer has market power is

determined by looking at its market share in the alleged relevant product market, not in some other market. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 38-39 (1977) (noting television manufacturer's market share in alleged relevant product market of television sets). Both the district court and the Eleventh Circuit found that Anheuser-Busch's market share of the relevant product market (less than 1%) and submarket (less than 3%) were far too small to support an inference of market power. Pet. App. 18-19. At trial, Maris Distributing's economic expert was unable to cite a single case in which a court had found market power with shares that small or to identify a single economist to agree with that conclusion. R76-221 to 222.

B. *Spectators' Communication* Is Inapposite

The Eleventh Circuit correctly ruled that *Spectators Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215 (5th Cir. 2001), was inapposite because it involved an alleged group boycott – *viz.* a collective horizontal restraint – as opposed to a nonprice vertical restraint unilaterally imposed by a manufacturer on its wholesalers. Pet. App. 20; *see also Spectators*, 253 F.3d at 223. In an effort to create a group boycott where there is none, Maris Distributing suggests that the public ownership provision is a "hub-and-spoke" conspiracy with "the same economic effect as a 'horizontal' agreement among distributors." Pet. 21. This theory, however, makes no economic or legal sense in the distribution context and would convert every vertical restraint case into a horizontal one. Indeed, the district court twice rejected Maris Distributing's argument that the public ownership provision was a horizontal restraint. R3-42-8 to 9; R6-104-5 to 7 & n.5. Those rulings were in accord with this Court's precedents, *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 & n.4 (1988), and were never appealed by Maris Distributing.

Even assuming that *Spectators' Communication* was factually on point with this case (which it is not), *Spectators' Communication* stands for the unremarkable proposition that a market power inquiry should focus on the market share of the relevant party in the relevant market. The district court dismissed antitrust claims against Anheuser-Busch in that case because it had no market power in the market for purchasing on-site advertising at PGA events. The Fifth Circuit reversed, noting the alleged product market was for the sale of such advertising and that the district court should have determined whether the PGA had market power in that market. 253 F.3d at 225. Applying *Spectators* to this case, the relevant inquiry is whether Anheuser-Busch had market power in the market for the purchase and sale of equity ownership interests in wholesale beer distributorships, precisely the inquiry undertaken by the district court and the Eleventh Circuit. Pet. App. 12-33.[12]

III. The Eleventh Circuit Did Not Create A "Contract Power" Exception to the Sherman Act

There is no basis whatsoever in the record or in the decision below for petitioner's contention that the Eleventh Circuit created a "contract power" exception to the Sherman Act. *See* Pet. 22-24. The petition does not cite a single page – or quote a single sentence – from the court's opinion to support the assertion. Indeed, the Eleventh Circuit said precisely the opposite: "[I]f the district court had held that Anheuser-Busch had not violated the antitrust laws simply because its actions were pursuant to a contract, that would have been incorrect. Anticompetitive actions are not immunized by virtue of being memorialized in a contract." Pet. App. 22.

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12 As a final matter, nothing in *Spectators* suggests that it is appropriate to ***aggregate*** market shares in a vertical restraint case.

Nor did the district court or the Eleventh Circuit ever conclude that Anheuser-Busch had "absolute control over output, prices, entry, and exit in a relevant market." Pet. 22. Significantly, petitioner provides no record citation for this claim either, other than a conclusory assertion that Anheuser-Busch "breach[ed] the contracts [with its wholesalers] and threaten[ed] bad faith terminations if distributors did not follow Busch's demands." *Id.* at 22 n.15. Yet the termination of Maris Distributing and other distributors was ***never*** a part of this case.[13] The district court ***excluded*** from evidence all documents and testimony offered by Maris Distributing that it and other distributors had been wrongfully terminated. R45-633-4 to 17; R69-141 to 148; R75-152 to 154; R85-43 to 47. Indeed, Maris Distributing acknowledges that it was precluded from presenting the very evidence on which it now seeks to rely. *Compare* Pet. 22 n.15 *with id.* at 9 n.3. Although petitioner unsuccessfully appealed the evidentiary rulings to the Eleventh Circuit (*see* Pet. App. 8-9 n.5) – it does not challenge those rulings here.[14]

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[13] On March 20, 1997, after this action had been filed, Anheuser-Busch terminated its Equity Agreement with petitioner on grounds that had nothing to do with the public ownership provision. *See, e.g.*, R64-173 to 174. The validity of that termination was litigated in a separate case in Florida state court.

[14] Petitioner's suggestion that the Eleventh Circuit created a "classic 'chicken-or-egg' dilemma" which will make it difficult to establish actual anticompetitive effects in cases like this one (*see* Pet. 11-12, 23) is inconsistent with its assertion below that it presented "abundant" evidence of actual effects. *See* Appellant's C.A. Br. 12, 19-21. Of course, the jury disagreed. R52-789. Accordingly, petitioner's dispute is not with the legal standard employed by the Eleventh Circuit but with the factual determination by the jury. Petitioner never challenged that finding below and does not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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